In the Supreme Court of the United States.

OCTOBER TERM, 1904.

LUTHER CLAY SLAVENS, APPELLANT,
v.
THE UNITED STATES. } No. 228.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

NOTE.

This case, by consent of counsel and order of court, is to be heard with the case of *Wesley E. Travis* v. *The United States*, No. 84, October Term, 1904. The question of law involved in that case, namely, the right of the Postmaster-General to discontinue the service under a covered regulation wagon mail messenger, transfer, and mail station service contract, is one of the questions also involved in this case, and with respect to that one question the brief and argument in the Travis case is relied upon the same as if set forth here, with only such brief mention as will make this case clear.

STATEMENT.

THE BOSTON CONTRACT.

On September 15, 1892, the Postmaster-General, acting therein, on behalf of the United States, advertised for proposals for transporting the mails in various cities, and among others on route No. 204001, being "covered regulation wagon mail-messenger, transfer, and mail-station service," at the city of Boston, Mass. (Rec., p. 41.)

This advertisement contained instructions to bidders, among which was the following:

> The contractor under this advertisement will be required to perform, *without additional compensation, any and all new or additional service that may be ordered from July 1, 1893, or at any time thereafter during the contract term*, whether between post-offices and railroad stations, between post-offices and steamboat landings, between post-offices and mail stations, or between the several railroad stations, steamboat landings, and mail stations now established, or that may hereafter be established, whether caused by the establishment of new or by change of site of existing post-offices, railroad stations, steamboat landings, or mail stations within said cities, or caused by the alteration of the routes made necessary for any other reason. Bids must be made with this distinct understanding, and must name the amount per annum for the whole service, and not by the trip. (Rec., p. 14.)

And also the following:

> Bidders must inform themselves as to the distance, the running time, the weight of the mails, the condition of hills, streets, toll bridges, ferries, and obstructions of all kinds whereby expense may be incurred, and as to the *probable increase, additional service, or changes likely to be rendered necessary.* Claims for additional pay based on such grounds, or for alleged mistakes or misapprehensions as to the service required, or for bridges destroyed or ferries discontinued can not be considered. (Rec., p. 15.)

And also the following:

> There will be no diminution of compensation for partial discontinuance of service or increase of compensation for new, additional, or changed service that may be ordered during the contract term; but the Postmaster-General may discontinue the entire service on any route whenever the public interest, in his judgment, shall require such discontinuance, he allowing, as full indemnity to the contractor, one month's extra pay. (Rec., pp. 14, 15.)

Pursuant to said advertisement and the matters contained therein, the claimant made and filed with the Department a proposal for the performance of said service for the period named therein, namely, from July 1, 1893, to June 30, 1897, inclusive, naming as the rate of compensation to be received therefor $49,516 per annum. (Rec., pp. 41, 42.)

Claimant's proposal was duly accepted by the Department, and on December 21, 1892, a contract was

entered into between him and the United States for the performance of the service accordingly, and thereupon the claimant engaged in the carrying of the mail thereunder. (Rec., pp. 19, 20, 21, 22, 23, 42.)

The contract so entered into referred to the advertisement and provided that by such reference the advertisement was thereby made a part of itself, and specifically stated that the contractor had been accepted to perform the service advertised, "and all new or additional service of said kinds which may at any time during the term of this contract be required in said city." (Rec., p. 19.)

By the second covenant of the contract, the claimmant contracted—

> To take the mail from, and deliver it into, the post-offices, mail stations, and cars at such points, and at such hours, under the directions of the postmaster at Boston, Mass., approved by the Postmaster-General, as will secure dispatches and connections and facilitate distribution, and at the contractor's expense for tolls and ferriage. (Rec., p. 20.)

By the tenth covenant of the contract, the claimant contracted—

> To perform all new or additional or changed covered regulation wagon, mail messenger, transfer, and mail-station service that the Postmaster-General may order at the city of Boston, Mass., during the contract term, without additional compensation, whether caused by change of location of post-office, stations, landings, or the establishment of others than those

> existing at the date hereof or rendered necessary, in the judgment of the Postmaster-General, for any cause, and to furnish such advance wagons or extra wagons from time to time for special or advance trips as the Postmaster-General may require, as a part of such new or additional service. (Rec., p. 21.)

The contract further provided;

> It is hereby stipulated and agreed by the said contractor and his sureties that the Postmaster-General may change the schedule and termini of the route, vary the routes, increase, decrease, or extend the service thereon, without change of pay; and that the Postmaster-General may discontinue the entire service whenever the public interest, in his judgment, shall require such discontinuance; but for a total discontinuance of service the contractor shall be allowed one month's extra pay as full indemnity. (Rec., p. 21.)

A further provision was as follows:

> And this contract is further to be subject to all the conditions imposed by law, and the several acts of Congress relating to post-offices and post-roads. (Rec., p. 22.)

During the time the claimant performed service under the contract, he was required to transport the mail between the mailing room and basement of the general post-office at the city of Boston, and the stopping place of the West End Street Railway Company, on Water street, in said city, from May 1, 1895, to February 1, 1896. The claimant protested against

the performance of this service to the postmaster at Boston, but no protest or objection was made to the Postmaster-General, nor to anyone connected with the Post-Office Department at Washington. If entitled to recover therefor, the reasonable value is $274.55. (Rec., p. 42.)

During the time the claimant performed service under the contract the postmaster at Boston directed him to carry the mails between the Back Bay post-office and the Brookline post-office, a distance of 2½ or 3 miles, the latter post-office being situated outside the city limits of Boston, and which service was not embraced within the terms of the contract. The claimant objected to the performance of this service to the postmaster at Boston, but did not make any protest to the Postmaster-General nor to any officer of the Post-Office Department, nor was the Postmaster-General or any officer of the Post-Office Department apprised of the fact of the performance of this service by the claimant until August 14, 1894. Upon being apprised of the performance by the claimant the Postmaster-General promptly ordered its discontinuance and entered into contract with another person for its performance, for which payment was made to such other person. If entitled to recover for this service, the reasonable value thereof is $462.50. (Rec., p. 42.)

On December 9, 1895, and during the term of the contract, the Postmaster-General ordered the claimant to discontinue the service being performed by him, and pursuant to such order the claimant was compelled to

so discontinue on January 31, 1896. The order of discontinuance was as follows:

> From January 31, 1896, discontinue service, allowing contractor one month's extra pay. (Rec., pp. 42, 43.)

This order of discontinuance was not made on account of any neglect or default on the part of the claimant in the performance of the contract, but was asserted by the Postmaster-General under the clause contained in the contract providing "that the Postmaster-General may discontinue the entire service whenever the public interest, in his judgment, shall require such discontinuance." (Rec., p. 43.) The service had been rightfully decreased, under the stipulations of the contract, until the services remaining to be performed were not reasonably worth the original contract rate, and to have continued its payment would have been contrary to public interests. The Postmaster-General's action was influenced solely because, in his judgment, the public interest required the discontinuance of claimant's services under the contracts in question. (Rec., p. 52.) The claimant was offered the privilege of continuing the service at a reduction from the contract rate, which he declined. (Rec., p. 43.) In order to have the service thus reorganized performed, the Postmaster-General ordered claimant to discontinue the service, as above stated, against the protest and objection of claimant, and thereafter relet the service so decreased to another for the remainder of said contract period, namely, from February 1, 1896,

to June 30, 1897, inclusive, at a compensation of $37,000 per annum, said route being designated in the new contract as No. 204002, and such service was thereafter performed by such other during the remainder of the contract term. (Rec., p. 43.)

If the claimant is entitled to recover damages as for a breach of contract because of its annulment during the term for which made, he should recover $14,757.81.

THE BROOKLYN CONTRACT.

On September 15, 1892, the Postmaster-General, acting therein on behalf of the United States, invited proposals also for transporting the mail on route No. 207001, being the "covered regulation wagon mail messenger, transfer, and mail station service," at the city of Brooklyn, N. Y. (Rec., p. 44.)

The advertisement contained the same instructions to bidders (Rec., pp. 14, 15, 16, 17, 18) which applied to the Boston advertisement, which instructions, therefore, included all the provisions hereinbefore set out as relating to the Boston contract, *supra*.

Pursuant to said advertisement and the matters therein contained, the claimant made and filed with the Department a proposal for the performance of the service for the period named therein, namely, from July 1, 1893, to June 30, 1897, inclusive, naming as compensation to be received the sum of $18,934 per annum. (Rec., p. 44.)

Claimant's proposal was duly accepted by the Department, and on December 21, 1892, a contract was entered into between him and the United States for

the performance of the service accordingly, and thereupon the claimant engaged in the carrying of the mails thereunder. (Rec., pp. 27, 28, 29, 30, 31, 44.)

The contract so entered into referred to the advertisement and provided that by such reference the advertisement was thereby made a part of itself; and specifically stated that the contractor had been accepted to perform the service advertised, "and all new or additional service of said kinds which may at any time during the term of this contract be required in said city." (Rec., p. 27.)

The second covenant (Rec., p. 28), the tenth covenant (Rec., p. 29), and the stipulation regarding the right of the Postmaster-General to discontinue the service "whenever the public interests, in his judgment, shall require such discontinuance" (Rec., pp. 29, 30), and that making the contract subject to the laws and acts of Congress relating to post-offices and post-roads (Rec., p. 30), are identical in every respect with the same covenants and stipulation in the Boston contract set forth *supra*.

During the claimant's term of service at Brooklyn, N. Y. (and from December 18, 1895), and in order to provide that city with improved mail facilities, the Post-Office Department established mail service on the Brooklyn Heights Railroad (railway routes Nos. 207805 and 207807), a street-car line, for the transportation in the cars of that company of the mails from the vicinity of the post-office to the vicinity of the postal stations E, W, and G, and the Long Island Railroad at

Long Island City (Manhattan avenue and Box street). (Rec., p. 44.)

The service thus established dispensed with the service theretofore required of claimant under his contract for the transportation of mails over the routes covered by said street-car line. In lieu of this service the claimant was required to perform service between the post-office and the mail route established on the street-car line and between said mail route and the mail stations. The same mails theretofore required under his contract to be transported over long distances were thereby required to be carried but very short distances. (Rec., p. 44.)

The service theretofore required of the contractor under his contract and the advertisement, of which he was relieved, and the service required of him in lieu thereof, is, in detail, as follows:

Claimant was required under the contract and advertisement to carry the mails between the general post-office and Station E, a distance of 5.38 miles, by 36 round trips per week. The service required of him in lieu thereof was to carry between Station E and the Brooklyn Heights Railroad (at Alabama avenue), a distance of 0.23 mile, by 119 round trips per week, from December 18, 1895. The miles of travel of which the claimant was thus relieved was 4,298.66. The miles of travel required in lieu thereof was 143.56; a reduction in the miles of travel which would otherwise have been required of 4,155.01. (Rec, pp. 44, 45 (*b*).) This is claim "(*b*)" of the petition.

In lieu of service theretofore required of claimant under the contract and advertisement, he was, from December 18, 1895, required to perform further service to Station E, such new service being from Manhattan Crossing to Station E, 0.38 mile, 18 round trips per week. Manhattan Crossing was a railroad station on a railroad route, No. 107124, and was in existence at the time the claimant made his contract. This service was provided for by paragraph 2 of the advertisement and provisions of the contract, section 10. (Rec., p. 45 (*a*).) This is claim "(*a*)" of the petition.

If claimant could recover for these services required above mentioned, the value of the same would be $142.01. (Rec., p. 47 (*a* and *b*).)

Claimant was required under the contract and advertisement to carry the mails from Station G to Station W, a distance of 1.65 miles, 50 trips per week, and from Station W to Station G, return, the same distance, 57 trips per week. The service required of him in lieu thereof was to carry the mails from Station G to the Brooklyn Heights Railroad (Manhattan and Greenpoint avenues), 0 06 mile, by 118 trips per week, and from the Brooklyn Heights Railroad to Station G, return, the same distance, by 119 trips per week, from December 18, 1895. The miles of travel of which the claimant was thus relieved was 1,855.92, and the miles of travel required in lieu thereof was 149.48, making a net reduction of miles of travel which would otherwise have been required of 1,706.44. (Rec., p. 45 (*c*).) This is claim "(*c*)" of the petition.

Claimant was required under the contract and advertisement to carry the mails between the general post-office and Station W, a distance of 2.57 miles, by 70 round trips per week. The service required of him in lieu thereof was to carry the mails between Station W and the Brooklyn Heights Railroad (at Bedford avenue and Broadway), a distance of 0.08 mile, by 232 trips per week, from December 18, 1895. The miles of travel of which the claimant was thus relieved was 3,782.14, and the miles of travel required in lieu thereof was 389.98, making a reduction in miles of travel which would otherwise have been required of 3,392.16. (Rec., p. 45 (*d*).) This is claim "(*d*)" of the petition.

If claimant could recover for this service, the value of the same would be $111.58. (Rec., p. 47 (*d*).)

Claimant was required under the contract and advertisement to carry the mails from the general post-office to Long Island Railroad at Long Island City, via stations S, W, and G, a distance of 8.10 miles by 6 trips per week; and from Long Island Railroad at Long Island City, via stations G and W, to the general post-office, a distance of 5.04 miles, by 12 trips per week. The service required of him in lieu thereof was to carry the mails between the Long Island Railroad at Long Island City and the Brooklyn Heights Railroad, a distance of 0.61 mile, by 36 round trips, from December 18, 1895. The miles of travel of which the claimant was thus relieved was 1,437.82, and the miles of travel required in lieu thereof was

461.76, making a reduction in miles of travel which would otherwise have been required, of 976.06. (Rec., p. 45 (*e*).) This is claim "(*e*)" of the petition.

If the claimant could recover for this service, the value of the same would be $60.96. (Rec., p. 47 (*e*).)

Further, during the claimant's term of contract at Brooklyn, the Department authorized and established regular railroad service on the Brooklyn Heights Railroad on route No. 107172, terminating in the city of Brooklyn. It became necessary in consequence of the establishment of this railroad route, to provide service between the general post-office and the terminus of such route at Fulton and Johnson streets, and the claimant was required to provide for the same. (Rec., pp. 45, 46.)

This service was, in detail, as follows:

Claimant was required to carry the mails from the general post-office to the Brooklyn Heights Railroad at Fulton and Johnson streets, a distance of 0.1 mile, by 81 trips per week, and from the Brooklyn Heights Railroad at Fulton and Johnson streets, to the general post-office, return, the same distance, by 57 trips per week, from May 8, 1895.

This service was properly required under paragraph 2 of the advertisement and the provisions of the contract, and the tenth section thereof. (Rec., p. 46 (*f* and *h*).) This is claim "(*f*)" and "(*h*)" of the petition.

Further, during the claimant's term of contract at Brooklyn, the Department authorized regular railroad service on the Brooklyn Heights railroad on route

No. 107143, terminating in the city of Brooklyn. It became necessary in consequence of the establishment of this railroad route to provide service between the general post-office and the terminus of said route at Fulton and Johnson streets, and the claimant was required to provide for the same. (Rec., p. 46.)

This service was, in detail, as follows:

Claimant was required to carry the mails between the general post-office and the Brooklyn Heights railroad, a distance of 0.1 mile, by 38 round trips, from January 7, 1895.

This service was properly required under paragraph 2 of the advertisement and provisions of the contract, and the tenth section thereof. (Rec., p. 46 (*g*).) This is claim (*g*) of the petition.

Further, during the claimant's term of contract at Brooklyn, the Department authorized regular railroad service on the Brooklyn, Bath and West End Railroad, on route No. 107076, terminating in the city of Brooklyn. This new railroad route superseded mail-messenger route 207066, which had been operated theretofore by the same railroad company, and which had terminated 3.66 miles from the general post-office, between which terminal and post-office the claimant had been required under the advertisement to perform service. The Department required the claimant to provide for the service between the general post-office and the new terminus, instead of the old terminus. The same mails were carried and to the same railroad, but to a new and nearer terminus. (Rec., p. 46.)

The service theretofore required of the claimant under his contract and the advertisement, of which he was thus relieved, and the service required of him in lieu thereof, is, in detail, as follows:

Claimant was required under the contract and advertisement to carry the mails between the general post-office and the Brooklyn, Bath and West End Railroad, a distance of 3.66 miles, by 18 round trips per week. The service required of him in lieu thereof was to carry the mails between the general post-office and the same railroad at the new terminus of the route, a distance of 0.01 mile, by same number of trips. The miles of travel of which the claimant was thus relieved was 11,506.01, and the miles of travel required in lieu thereof was 31.38, making a reduction in miles of travel which would otherwise have been required of 11,474.63. Even if it were not considered the same service, the requirement as to performance of which was more advantageous to claimant, it was, nevertheless, properly required under paragraph 2 of the advertisement and provisions of the contract, and the tenth section thereof. (Rec., pp. 46, 47 (*i*).) This is claim "(*i*)" of the petition.

If the claimant could recover for this service, the value of the same would be $840.66. (Rec., p. 47 (*i*).)

In every instance excepting the service between the post-office and the Brooklyn Heights Railroad on route 107172, and between the post-office and the Brooklyn Heights Railroad on route 107143, it was new service to new stations (or to a station in existence, as to route

107124). In the case of service between the post-office and the Brooklyn, Bath and West End Railroad on route 107076, it was service to a new route and new station, though the service was in fact the same service, but performed over a shorter distance. (Rec., p. 47.)

On January 21, 1896, and during the term of claimant's contract, the Postmaster-General ordered the claimant to discontinue the service so being performed by him, and pursuant to said order the claimant was compelled to so discontinue from February 29, 1896. The order of discontinuance was as follows:

> Discontinue service from February 29, 1896, and allow contractor one month's extra pay. (Rec., p. 47.)

This order of discontinuance was not made on account of any neglect or default on the part of the claimant in the performance of the contract, but was asserted by the Postmaster-General under the clause contained in the contract providing "that the Postmaster-General may discontinue the entire service whenever the public interest, in his judgment, shall require such discontinuance." (Rec., p. 47.) The service had been rightfully decreased, under the stipulations of the contract, until services remaining to be performed were not reasonably worth the original contract rate, and to have continued its payment would have been contrary to public interests. The Postmaster-General's action was influenced solely because, in his judgment, the public interest required the discontinuance of claimant's serv-

ices under the contract in question. (Rec., p. 52.) In order to have the service as thus reorganized performed, the Postmaster-General ordered claimant to discontinue the service as above stated, against his protest and objection, and thereafter relet the service so decreased to another for the remainder of the contract period, namely, from March 1, 1896, to June 30, 1897, inclusive, at a compensation of $9,720 per annum, said route being designated in the new contract as No. 207004, and such service was thereafter performed by such other during the remainder of the contract term. (Rec., p. 48.)

THE OMAHA CONTRACT.

On September 15, 1893, the Postmaster-General, acting therein on behalf of the United States, advertised for proposals for transporting the mails in various cities, and, among others, on route No. 257001, being the "covered regulation wagon mail messenger, transfer, and mail station service" at the city of Omaha, Nebr. (Rec., p. 48.)

This advertisement contained the same instructions to bidders (Rec., pp. 14, 15, 16, 17, 18) which applied to the Boston and Brooklyn advertisements, which instructions, therefore, included all the provisions hereinbefore set out as relating to the Boston contract, *supra.*

Pursuant to said advertisement and the matters therein contained, claimant, under the name of Luther Clay Slavens, jr., made and filed with the Department a proposal for the performance of the service for the period

named therein, namely, from July 1, 1894, to June 30, 1898, inclusive, naming as compensation to be received therefor the sum of $3,780 per annum. (Rec., p. 48.)

The proposal was duly accepted by the Department, and on December 21, 1893, a contract was entered into between him and the United States for the performance of the service accordingly, and thereupon the claimant engaged in the carrying of the mails thereunder. (Rec., pp. 35, 36, 37, 38, 39, 48.)

The contract so entered into referred to said advertisement, and provided that by such reference the advertisement was thereby made a part of itself, and specifically stated that the contractor had been accepted to perform the service advertised "and all new or additional service of said kinds which may at any time during the term of this contract be required in said city." (Rec., p. 35.)

The second covenant (Rec., p. 36) and the tenth covenant (Rec., p. 37) are identical in every respect with the same covenants in the Boston contract set forth, *supra*.

During the claimant's term of service at Omaha, Nebr., the Department authorized and established two new railroad mail routes in that city, operated by the Omaha Street Railway Company, one between the Union Depot and the Omaha post-office, Fourteenth and Dodge streets, and the other between Fourteenth and Dodge streets and South Omaha. One end of each of these routes terminated at Fourteenth and Dodge streets, which was a junction and transfer point, such

as is usual with street-car lines in cities for the accommodation of the public, and the other end of one of these routes terminated at the Union Depot. (Rec., pp. 48, 49.)

After the establishment of these railroad routes between the points a large amount of the service theretofore performed by the claimant in wagons between the points was thereafter performed by the street-car company over the railroad route. By reason of the establishment of these new railroad routes it became necessary to provide service between their termini at Fourteenth and Dodge streets and the post-office, between the two routes (transfer of mails) at that point, and between the terminus of one route and the Union Depot. Though not so ordered, this service was in part performed in lieu of such service between the general post-office and the Union Depot, of which the claimant had been relieved by reason of its performance by the street car company on the newly established railroad route. (Rec., p. 49.)

The amount of service of which the claimant was thus relieved was 176.6 miles of travel per week, while the amount which was required of him in lieu thereof was 41.06 miles of travel per week, making a reduction in the miles which would otherwise have been required of 132.54 per week. Though the subsequent advertisement of service included all that the claimant performed, and besides considerable other service which he did not perform (service which had been theretofore included under a mail-messenger route), yet

the claimant's own estimate of the value of the combined service was only $347 per annum more than he was being paid for the lesser service, and out of the lowest nine bidders seven of them estimated by their proposals the value of the combined service at less than the amount which claimant was being paid for the lesser service, the bid of the lowest bidder, to whom the service was subsequently awarded, being $1,130 less. (Rec., p. 49.)

The service thus established was a mere substitution of another manner of performing the same service contracted for and at an advantage to the claimant, and was otherwise properly required under paragraph 2 of the advertisement and provisions of the contract and the tenth section thereof. (Rec., p. 49.)

Claimant brought suit in the Court of Claims to recover the value for the new and additional service as hereinbefore set forth, alleging it to have been extra service not contemplated by the contracts, and to recover damages for the action of the Postmaster-General in discontinuing the service under his contracts. The court dismissed the petition upon the ground that the service to the point outside of Boston was performed without the knowledge or request of anyone having authority of the United States, and that the other service required of claimant was such new and additional service as was described and contemplated by the contracts, and that the contracts themselves gave the Postmaster-General the right to discontinue the service whenever the public interest, in his judgment, should

require such discontinuance, the claimant in such case to be allowed one month's extra pay as full indemnity; that the Postmaster-General rightly discontinued the service under claimant's contracts to subserve the public interest in taking care that no unreasonable compensation was paid for the service actually performed.

From this judgment the present appeal was taken.

ARGUMENT.

There are two questions involved in these three contracts: The first, the question whether the service required under the Boston, the Brooklyn, and the Omaha contracts, and for which claim is made, was new and additional or changed service of the kind named in the contract that the Postmaster-General might order without additional compensation (and in one instance where it was not such service, whether the defendants are responsible for the unauthorized acts of the postmaster in so ordering service without their knowledge or sanction); and the second, the question of the right of the Postmaster-General to discontinue the service of claimant under the Boston and Brooklyn contracts when he, the Postmaster-General, should, in his judgment, believe that the public interests require it. These may be best examined separately and in the order stated.

I.

NEW AND ADDITIONAL SERVICE PROVIDED FOR WITHOUT ADDITIONAL COMPENSATION.

AN EXCEPTION; BUT NO LIABILITY.

In the case of the Boston service there was one instance where the claimant was required by the postmaster to perform service between the Back Bay post-office and the Brookline post-office, the latter being situated outside the city limits of Boston, which was not warranted by the terms of the contract. For this, however, the United States are not liable, because the requirement was made by the postmaster and not by or with the authority, knowledge, or consent of any officer of the Post-Office Department. The claimant, though protesting to the postmaster at the time, did not protest to the Postmaster-General or to any officer of the Post-Office Department until August 14, 1894, whereupon the Postmaster-General promptly relieved the claimant of the service.

The question of law involved here is whether, under these circumstances, the postmaster at Boston is the authorized agent of the Postmaster-General to order the claimant to perform this service, and thus fix a liability upon the United States for its value. In the usual course of business of the Post-Office Department all orders requiring additional service are issued by the Postmaster-General and none are issued by the postmaster, who has no authority whatever in the premises.

The judgment on this point by the Court of Claims was for the United States, the court using this language:

> * * * The claimant insists upon compensation for carrying the mails between Back Bay and Brookline post-offices, the latter being outside the city of Boston; but as this service was performed without the knowledge or request of anyone having defendants' authority, this item, it is plain, can not be allowed, and it will be dismissed from the case without further notice. (*Whitsell* v. *United States*, 34 C. Cls. R., 5.) (Rec., p. 50.)

In the Whitsell case cited, where the contractor had performed extra service with the knowledge of the postmaster, but without the knowledge of any officer in the Post-Office Department, the court say:

> Notice to the postmaster that the service was being performed can not be imputed as notice to the Post-Office Department, for the reason that a postmaster has no power or authority to contract in respect of mail-messenger service, nor is he the agent of the Government to direct such service, as he is, within the limits of their duties, of letter carriers, who are his subordinates. (*Pitcher's case*, 1 C. Cls. R., 7, 11; *Ford's case*, 17 C. Cls. R., 60, 76; *Legare's case*, 24 C. Cls. R., 513, 516; 32 C. Cls. R., 417.)
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> It follows that the Government can only be bound by the acts of its authorized agents, and, too, within the limits of their respective duties. (*Smith's case*, 32 C. Cls. R., 259, 309; *Roberts et al., Trustees*, v. *The United States*, 92 U. S. R., 41,

48.) Hence, it is the duty of persons dealing with public officers to inquire as to their power and authority to bind the Government. (*Hume* v. *United States*, 132 U. S. R., 406.)

REQUIRED SERVICE—PROVISIONS OF CONTRACT UNDER WHICH REQUIRED.

All the other instances under this heading of claim for new or additional service are those with respect to which the United States insist that the service was rightfully required under the provisions of the contract. What those provisions are has been fully set forth in the statement of facts as found by the Court of Claims, *supra*. They are essentially the same as to each contract, and can therefore be treated together. They are, in brief, as follows:

In issuing the advertisement inviting proposals for performance of the service the Postmaster-General warned prospective bidders that they would be required to perform, without additional compensation, *any and all new or additional service* that might be ordered at any time during the contract term, whether between post-offices and railroad stations, between post-offices and steamboat landings, between post-offices and mail stations, or between the several railroad stations, steamboat landings, and mail stations then established or that might thereafter be established, whether caused by the establishment of new or by change of site of existing post-offices, railroad stations, steamboat landings, or mail stations within said cities, or caused by the alteration of the routes made necessary for any

other reason. Bidders were admonished to inform themselves of the *probable increase, additional service, or changes likely to be rendered necessary* during the term.

The claimant submitted his proposals under these conditions and entered into contracts for the three cities with the United States, which expressly made the terms of the advertisement a part of such contracts and specifically provided for the performance of not only the service named in the advertisements, but of "*all new or additional service of said kind which may at any time during the term of this contract be required in said city*" in each case.

The claimant further contracted to take the mail from, and deliver it into, the post-offices, mail stations, and cars at such points, and at such hours, under the direction of the postmaster of these respective cities, approved by the Postmaster-General, as would secure dispatches and connections and facilitate distribution.

He further agreed by the express terms of his contract to perform all new and additional or changed covered regulation wagon mail messenger, transfer, and mail-station service that the Postmaster-General might order in these several cities during the terms of his contracts, without additional compensation, whether caused by change of location of any of the offices, stations, etc., named, or by the establishment of others than those then extsting, "*or rendered necessary, in the judgment of the Postmaster-General, for any cause.*"

PURPOSE AND REASONABLE CONSTRUCTION OF THESE PROVISIONS.

Upon the interpretation to be given those provisions of the contracts depends the question as to whether the claimant is entitled to additional compensation for the services required of him for which claim is made. The Court of Claims held that these provisions clearly covered the services which were required of the claimant and that therefore he has no just claim for additional compensation.

It is apparent that the purpose of these provisions was to provide a contract which should be sufficiently flexible to meet the conditions which arise in cities by reason of changes in the location or otherwise of existing post-offices, mail stations, railroad mail routes, railroad stations or depots, and wharves, or the establishment of new ones. This intention is evidenced not only in the terms of the contract which is the final agreement of the parties, but it may be clearly inferred from the advertisement inviting proposals for the service. Warning is repeatedly given that the contractor will be required to perform not only the service specified in the schedule of the advertisenent, but all new or additional service of the same kind, whether between any of the points named or between others which may be established in the future. Not only is this comprehensive language repeatedly used, but it is finally followed in the contract by the provision that the contractor shall perform such additional service without

additional compensation if "rendered necessary, in the judgment of the Postmaster-General, for any cause."

The rapid growth of cities, with the consequent changes in postal and transportation needs and facilities, makes it necessary, in entering into a four-year contract for wagon service, to provide for all changes in these conditions in general and broad terms such as here used. These provisions are apparently designed to meet those emergencies. They can have no other meaning.

The only limitation or restriction imposed upon the right to include such new service in the requirements of the contract is that it shall be of the kinds mentioned in the advertisement and contract.

The question as to what is "new or additional" service of the "kind" named in such advertisement and contract has been determined by the courts to some extent. In the *Wolverton case* (27 C. Cls. R., 292), it was held that the word "additional" would not transfer to the wagon service a service already in existence as a separate route and performed by other means at the time of the advertisement. Also, in the *Wolverton case* (34 C. Cls. R., 247), "mail messenger service" was held not to include the transportation of gold; and that "mail stations" did not include street boxes and substations differing in no substantial respect from street boxes, a "substation" being distinct from a "branch post-office" or "mail station" under the law governing the Post-Office Department. In the *Union Transfer Co. case* (36 C. Cls. R., 216), it was held that a new system of

"receiving stations" (substantially the same as the "substations" in the *Wolverton case*) was not included, but that new branch post-offices or full stations were.

In none of these cases has the question arisen upon a like state of fact as exists in this one, and there is no analogy between the facts of those cases, with respect to which the courts have held the service to be outside the terms of the contract, and the facts of this case. There is, however, a clear analogy between the facts of this case and those which have been held to be within the meaning of the provisions, as, for instance, additional stations in the *Union Transfer Company's case, supra.*

Counsel for claimant has made special effort to show that the judgment of the Court of Claims in this case is inconsistent with prior and subsequent decisions, and quotes from such decisions in his argument. It has been stated above that the question presented here has never been specifically passed upon in any other case, and that the argument to be drawn from the language in other cases is clearly in favor of the United States.

An examination of the cases thus quoted from will show that the service held to be not of the "kind" specified in the contracts there under consideration was in no respect like the service required of complainant in the case at bar.

For instance, in the Otis case (120 U. S., 115) there were two contracts, one for "mail-messenger service," "for carrying the mails between the New York City post-office and the railroad stations and steamboat

landings, and between the several stations where transfer service is required;" the other for "mail-station service" "between New York City post-office and branch offices." Compensation for increased service was excluded in the former contract, but included in the latter. Service was subsequently ordered between Station E, 465 Eighth avenue, and Hudson River Railroad depot, and the question was whether it should be paid for as if ordered under the latter contract or whether it was service such as was described under the former contract. It was held to be "mail-station service," and, therefore, that it was not such service as was described under the former contract where no mention is made of mail stations. Service was also ordered between New York City post-office and the Pennsylvania Railroad depot in Jersey City, N. J., and the question in reference thereto was whether it was service within the description of the former contract. It was held that the contract covered only such additional duties without compensation as related to service in the *city of New York.*

In the Knox case (30 C. Cls. R., 59) the question was whether a mail-bag repair shop was a mail station such as the advertisement and contract described and contemplated. It was held that it was not.

In the Wolverton case (34 Id., 247) it was held that the transportation of gold did not come under the designation of "mail-messenger service" to transport the *mail;* that mail service from "mail stations" (which term has a defined meaning under the statutes and the

practice of the Department) did not mean service from substations or street letter boxes; and that a contract to carry mail from New York and the railroad station in Jersey City did not cover mail for Jersey City post-office.

In the Union Transfer case (36 Id., 216) it was held *inter alia* that service to mail stations did not cover service to reciving stations.

In the Utah, Nevada and California Stage Co. case (not yet reported) the court held that the establishment of the Industrial Building Branch, about 3½ miles north of the New York City post-office, and the removal thereto of a considerable part of the duties which had theretofore been performed at the city post-office, was the introduction of a new condition in the city postal service which had never been there before; that is, the establishment of a new post-office system, and the claimant was allowed to recover for the services performed thereto. This case, however, is now pending on appeal to this court.

These are the particular features of service which were held to be not of the "kind" described under the contracts there under consideration, and it will be readily seen that they are not at all analagous to the service required of complainant in the case at bar. He was not required to carry anything but mail, and such as he would have been obliged to otherwise carry between points named in his contract, and to carry it, not to points wholly different in "kind" from those named in the advertisement and contract, but to such

as were of the same "kind" in every substantial and actual feature. Nor can it be said that the authorization of mail service upon street railways as regular railroad routes or otherwise was the introduction into the postal service of a new condition or a new system, it in fact being only an extension of a long-existing and well-understood method of transporting the mails between post-offices and postal and railroad stations.

SERVICE REQUIRED WAS OF SAME "KIND" AS THAT SPECIFIED IN CONTRACT.

THE BOSTON SERVICE.

The following examination of the facts will show the required service to have been clearly of the kind contracted for.

The schedule of service detailed in the advertisement for the Boston service shows service to be performed between the general post-office and various railroads and railroad stations. (Rec., p. 11.) The West End Street Railway was not among those named, however, and it is to this railway, at its stopping place on Water street, that the claimant was required to perform service, and for which he asks compensation.

Service had been established upon this street railway (which action resulted in such a great reduction of the claimant's service as originally specified in the advertisement that the entire contract was ultimately discontinued), and it became necessary to have the mails carried from the post-office to this new route, a very short distance and entailing a very small amount of service compared with the amount dispensed with.

The service was for the carrying of the mails (the same which would have been carried elsewhere by the contractor) between a post-office and a railroad route, and was therefore clearly "messenger service."

There was no practical distinction between this new route and the ones originally named in the advertisement. They were all routes upon which the mails were carried, either in or terminating at Boston, and between which and the post-office it was necessary to have this or an exactly similar wagon service to connect. There is no distinction whatever made in the contract or advertisement between steam-railroad routes and street-railway routes. In the contemplation of the service, and in reason, one kind stands in the same relation to the wagon service as the other. The mails were carried upon the one as upon the other, and it was necessary in both cases to provide wagon service to and from their stations. Nor is it material whether those stations be buildings of a steam road or stopping places on the line of a street railway. The only meaning or purpose of a "station," so far as the mail service is concerned, is a point where mails may be received or dispatched. This point designated on the street-car line answered that purpose. It bore the same relation to the street-railway mail route that the building or depot did to the steam-railroad mail route. In both cases they are, as far as the mail service is concerned, merely points at which mail may be delivered to or received from the cars of the route.

It is submitted, therefore, that in every essential feature, the service required in Boston was of the same "kind" as that specified in the advertisement and contract.

In connection with the claim for compensation for this particular service, it is further submitted that, even if the service did not clearly fall within the provisions relied upon, the claimant can not recover, because he performed it without protest or objection to the Postmaster-General or any officer of the Post-Office Department. It is true that he protested to the postmaster at Boston, which protest was not brought to the knowledge of the Department, but this was of no avail, because the postmaster is not the agent of the United States for this purpose. (*Whitsell* v. *The United States*, 34 C. Cls. R., 10, and cases cited.)

THE BROOKLYN SERVICE.

With respect to the Brooklyn contract the case is essentially similar. The schedule of service detailed in the advertisement shows service to be performed between the general post-office, railroad stations, and mail stations. (Rec., pp. 25, 26.) The Brooklyn Heights railroad was not named among them, however, and it is to this railroad (and to one as well, that is named) that claimant was required to perform additional service and for which he asks additional pay. During the term of claimant's service, and for the purpose of providing the city of Brooklyn with improved mail facilities, the Postmaster-General established new

railway mail routes on this street railroad which superseded a large part of the claimant's wagon service as contracted for. In lieu of this service so dispensed with the Postmaster-General required this service to the new routes—a vastly reduced service, as shown in the statement of facts, *supra*. Was this of the "kind" contracted for?

Clearly, it was "mail-messenger * * * and mail-station" service, for identically the same mails were carried between the post-office and the new railroad routes and between the mail stations and the new railroad routes as would otherwise have been carried by the claimant between the post-office and the mail stations without the intervention of the street-railroad mail routes. It was the identical mail, of the same origin and destination.

The same reasons which are advanced with reference to the Boston service to show that there is no practical distinction between the character of the route and its station to which service was required and the routes and stations specified in the advertisement are entirely applicable to the Brooklyn service, and are controlling to the same extent.

It is submitted, therefore, that in every essential feature the service required in Brooklyn was of the same "kind" as that specified in the advertisement and contract.

Not only was all the Brooklyn service the same kind as that specified in the contract, and fully covered by the special provisions herein relied upon, but several

of the requirements were for service to regular railroad routes terminating in Brooklyn (not mere local city street-car mail service), in all respects similar to the railroad routes named in the advertisement, one of which operating companies (the Brooklyn, Bath & West End R. R.) was also named therein. These were services to routes No. 107172, No. 107143, and No. 107076; one requirement also was for service to a station on No. 107124 in existence at the time of the advertisement, and as to these no doubt can exist.

THE OMAHA SERVICE.

With respect to the Omaha contract the case is essentially similar. The schedule of service detailed in the advertisement shows service to be performed between the general post-office, railroads, and Union depot and Webster street depot, and transfers. (Rec., pp. 33, 34.) The Omaha Street Railway was not named among them, however, and it was to this railway that claimant was required to perform additional service for which he asks additional pay. During the term of claimant's service, and for the purpose of providing improved service in Omaha, two new railroad routes were established upon this railway, which superseded a large part of the service theretofore performed in wagons by the claimant under his contract. In lieu of this service so dispensed with the claimant was required to provide service to these new routes—a much reduced service.

Clearly, it was "mail messenger" service, for identically the same mails were carried between the general post-office and the new railroad routes, transferred between them, and between the routes and the Union depot, as would otherwise have been carried by the claimant between the post-office and Union depot by wagons and without the intervention of the street railway mail routes. It was the identical mail of the same origin and destination.

The same reasons which are advanced with reference to the Boston service to show that there is no practical distinction between the character of the route and its station to which service was required, and the routes and stations specified in the advertisement are entirely applicable to the Omaha service and are controlling to the same extent.

It is submitted, therefore, that in every essential feature, the service required in Omaha was of the same "kind" as that specified in the advertisement and contract.

THE POSTMASTER-GENERAL TO DETERMINE THE NECESSITY FOR SUCH SERVICE.

The contract provided that the contractor should perform all such new or additional service which might be "rendered necessary, in the judgment of the Postmaster-General, for any cause"

Upon this point Mr. Justice Wright said, in rendering the opinion of the Court of Claims in this case:

> The service so described was such as might be rendered necessary for any cause, in the judg-

ment of the Postmaster-General. It must, of course, be connected with, or an incident to, the covered wagon mail messenger, transfer, and mail station service, for such only is the subject-matter of the contracts. It is easily seen that the extra service claimed for readily falls within the class or description of service specified in the contracts, or in part of, or incident to such service, rendered necessary for some sufficient cause. The discretion or judgment of the Postmaster-General, given by the contract, to determine the necessity of such service, ought not to be questioned, unless to prevent unwarranted or unjust interruptions in the contract rights vested in the claimant. It will not be presumed that officer required the performance of services not demanded by the exigencies of the business. Nothing appearing to the contrary, it will be assumed that the service required was necessary to the proper administration of the powers conferred by law upon the head of the Department, which was clearly reserved by the stipulations contained in the contracts. (Rec., pp. 50–51.)

If these provisions relied upon did not warrant the requirements made of the claimant, it is difficult to conceive what purpose they could serve in the contract. If they did not provide for just such a natural change in the postal and transportation necessities, the Postmaster-General was powerless to meet such without duplication of service, with unreasonable and unnecessary duplication of cost.

THE CLAIMANT WAS NOT DAMAGED.

The facts as found by the Court of Claims, and as hereinbefore recited in the statement, show that the service for which the claimant sues was required of him in lieu of service due from him under his contract, and of which he was relieved thereby, and that the amount of such service of which he was so relieved was greatly in excess of that required of him. A summary showing the proportion of this excess is as follows:

In Boston the service was so greatly decreased that the Postmaster-General afterwards determined that the public interest required him to discontinue the service and relet the residue under a new contract. Under the claimant's contract there was no deduction from his pay on account of the decrease in service.

In Brooklyn the total number of miles of service of which he was relieved was 22,880.55, and the total number of miles of service required in lieu thereof as far as ascertained was 1,176.16, leaving a net total of 21,704.39 miles of travel of which the claimant was thereby relieved from performing.

Under the terms of his contract there could be no decrease in the claimant's pay therefor. The decrease in the service was so great that the Postmaster-General afterwards determined that the public interest required him to discontinue the service and relet the residue under a new contract.

In Omaha the number of miles of service per week of which he was relieved was 176.6, and in lieu thereof he was required to perform only 41.06, making a reduction of 132.54 miles per week.

The service thus established was a mere substitution of another manner of performing the same service contracted for and at an advantage to the claimant, as was specifically said by the Court of Claims regarding the Omaha service.

This being true there is no ground whatever upon which a recovery can be reasonably and equitably urged. It is believed that the Court of Claims properly stated the law on this point in the *Union Transfer Company's case* (**36** C. Cls. R., 229), as follows:

> If the claimant performed in substance the same service which he was required to perform under the contract with less trouble and expense to himself, upon a *quantum meruit* claim, he would not be entitled to recover. If by consent of the other contracting party a party is relieved from a portion of the contract and performs an act not coming directly within the contract at less expense and trouble, he can not charge the other party with additional pay if by such arrangement he was exonerated from an equivalent service under the agreement.

II.

THE DISCONTINUANCE OF THE SERVICE UNDER THE CONTRACTS.

CLAIM FOR DAMAGES.

The remaining question involved arises upon the claim for damages as for an alleged breach of contract on the part of defendants in discontinuing the service in Boston and Brooklyn.

The facts as to the action of the Postmaster-General in this regard are fully set forth in the statement, *supra*.

In the proper exercise of discretion reposed in him the Postmaster-General had established improved mail service for the cities of Boston and Brooklyn by the authorization of mail service upon certain street railroads during the term of claimant's wagon contracts. The placing of service upon these new routes relieved claimant of the performance of a large amount of wagon service called for under his contracts. Such service provided for in cities is subject to constant change as to the amount of service required, the weight of mails carried, and the increase or decrease in mileage to be performed which may be required of the contractor thereunder; consequently it has long been customary to provide in such contracts that these changes in requirements shall be without change of pay—so long as the service is allowed to continue—and the claimant's contracts provided, therefore, that there should be no diminution of compensation for partial discontinuance of service; consequently if these contracts were to be continued the United States would continue to pay claimant for the large amount of service which he was not performing and for which they were paying others. But while it is true that these contracts provided in this manner for such mutations in the service, which provision would undoubtedly govern so long as the contracts were allowed to remain in force, yet there was another provision in the same clause which gave the Postmaster-General the

right to discontinue the whole service whenever the public interest, in his judgment, should require it.

Believing that the public interest demanded such discontinuance, the Postmaster-General did so discontinue the service under the claimant's contracts in both cities, allowing him one month's extra pay in each case, in accordance with the provisions of the contracts, he having first given the claimant an opportunity to continue the service in Boston at a reduced price, which the claimant refused to do.

It is contended on the part of the claimant that this was a breach of the contract for the reason that the United States were obliged, under the terms of the contract, to continue it without diminution of pay, notwithstanding the decrease in the service, and that the Postmaster-General had no power to discontinue the remaining service under the claimant's contract, but only to discontinue the whole mail service.

On behalf of the United States it is insisted that the acts of the Postmaster-General were in all respects in accordance with the power reserved to him in the contract itself.

Reference here is specifically made to the brief for the United States in the case of *Wesley E. Travis, appellant*, v. *The United States*, No. 84, October term, 1904 (the question there involved being identical with this one question here), in support of the contention of the United States and the judgment of the Court of Claims, and only brief mention will be made here of the principal grounds upon which that argument is based.

THE RIGHT OF THE POSTMASTER-GENERAL TO DISCONTINUE THE SERVICE.

1. The right to discontinue the service is provided for by the Postal Laws and Regulations, section 817, edition 1887 (in force at the time of the execution of the contracts).

This regulation, made in accordance with Revised Statutes, section 161, conferring upon the Postmaster-General the right to make regulations not inconsistent with law, is thus given the full force and effect of a statutory enactment.

The contracts being made for the transportation of the mails were, by necessary implication, subject to this regulation in so far as the contract provisions themselves did not supersede it, and to a like extent they were made subject to the regulation by a specific provision of the contracts.

2. Although it is insisted that the provisions of this regulation fully authorized the Postmaster-General to discontinue the service under claimant's contracts, it is not relied upon wholly, because it is quite unnecessary to seek any other authority for that right than that which is found in the express terms of the contracts themselves.

The advertisement provides as follows:

> There will be no diminution of compensation for partial discontinuance of service, or increase of compensation for new, additional, or changed service that may be ordered during the contract term; but the Postmaster-General may discon-

> tinue the entire service on any route whenever the public interests, in his judgment, shall require such discontinuance, he allowing as full indemnity to the contractor one month's extra pay.

The contract not only makes this a part of itself, but by further express stipulation provides as follows:

> It is hereby stipulated and agreed by the said contractor and his sureties that the Postmaster-General may change the schedule and termini of the route, vary the route, increase, decrease, or extend the service thereon, without change of pay, and that the Postmaster-General may discontinue the entire service whenever the public interest, in his judgment, shall require such discontinuance; but for a total discontinuance of service the contractor shall be allowed one month's extra pay as full indemnity.

There is no uncertainty in these provisions as to the authority intended to be conferred upon the Postmaster-General. There are two subject-matters contained therein, each of which may be entirely distinct from and independent of the other. The first is that for an increase or decrease in service there will be no change in pay. The second is that the Postmaster-General may discontinue the entire service when, in his judgment, the public interests demand it. These are independent propositions. If the service be increased or decreased and the contract be allowed to continue in force, the contractor's pay shall not be increased or diminished. If, however, the Postmaster-General believes that the public interests require the

discontinuance of the service under the contract, he is given full and unlimited power so to discontinue it whenever, in his judgment, it is so demanded, and such decrease may become the sufficient reason, as well as any other, therefor.

3. The right to discontinue mail service under a regulation *similar* to the one above quoted has been determined by this court. (*Garfielde* v. *The United States*, 93 U. S., 242; *Chicago and Northwestern Rwy. Co.* v. *The United States*, 104 U. S., 680.)

The practice to so discontinue it has been officially advised by the Attorney-General under practically identical conditions, and must be presumed to have become an executive construction by the Postmaster-General. (19 Op. A. G., 147, 148.)

THE GROUNDS ON WHICH THE DISCRETION WAS EXERCISED, AND THE FACTS WHICH CONSTITUTED THEM.

The grounds upon which this discretion could be exercised are as follows:

1. Section 817, Postal Laws and Regulations, 1887, *supra*, provides for such discontinuance being made, (*a*) "In order to supply on the route superior service;" (*b*) "Or whenever the public interests, in his judgment, shall require such discontinuance or curtailment for any other cause."

2. The instructions to bidders, set forth in the advertisement and made a part of the contracts, provide that the Postmaster-General may discontinue the service "whenever the public interests, in his judgment,

shall require such discontinuance." The contracts specifically provide, further, that he may discontinue the service "whenever the public interests, in his judgment, require such discontinuance."

The claimant's services required under the original schedule of the advertisement had been greatly decreased by reason of the inauguration of new and improved service and diversion thereto of mails which were to have been carried by the claimant under his contracts.

THE DISCONTINUANCE.

Believing that the conditions provided for in the contracts had arisen, the Postmaster-General discontinued the remaining service under the claimant's contracts in both cities; but it is claimed by counsel for claimant that he was not authorized by the provision in the contract to discontinue the *service which then remained* to be performed, but that he was only authorized to discontinue the *entire service*.

The fallacy of this proposition has been considered at length in the brief in the Travis case, hereinbefore referred to.

III.

From the foregoing it clearly appears that the service performed to the point outside of Boston was without the knowledge or request of anyone having authority from the United States, for which, therefore, they are not liable, and that the other service required of the complainant was such new and additional service as

was provided for and contemplated by his contracts, and that the action of the Postmaster-General in discontinuing the service under claimant's contracts was in accordance with the provisions contained therein and fully warranted, and hence the judgment of the Court of Claims was right and just.

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